No. 96-8653

Supreme Court, U.S.
FILED
SEP 30 1997
CLERK

IN THE

Supreme Court of the United States

October Term, 1996

KEVIN D. GRAY,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, HAWAII, LOUISIANA, MICHIGAN, MONTANA, NEVADA, OKLAHOMA, UTAH AND VERMONT AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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18 pp

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181 Delaware Street, Walton, NY 13856—800-252-7181
(3611 – 1997)

TABLE OF CONTENTS

Page

Interests of Amici Curiae 1

Summary of Argument 2

ARGUMENT

The method of redaction employed by the State of Maryland to permit the introduction of a confession at a criminal trial, with limiting instructions to the jury, removed all spillover prejudice to a co-defendant so as not to be violative of the Confrontation Clause 3

A. Consistent with this court's decision in *Bruton*, the redaction with a limiting instruction as approved by the court below, was not violative of the Confrontation Clause 4

B. Juries may be presumed to follow instructions that are grounded in their common experience and restate their widely held beliefs 8

Conclusion 13

TABLE OF AUTHORITIES

Page

Cases

Boyd v California, 494 U.S. 370 (1990) 9

Brown v United States, 411 U.S. 223 (1973) 12

Bruton v United States, 391 U.S. 123 (1968) . . . . . passim

Cruz v New York, 481 U.S. 186 (1987) 12

Francis v Franklin, 471 U.S. 307 (1965) 8

Harris v New York, 401 U.S. 222 (1971) 9

Hopt v Utah, 120 U.S. 430 (1887) 12

Huddleston v United States, 485 U.S. 681 (1988) 9

Lee v Illinois, 476 U.S. 530 (1986) 5, 7, 11, 12

Marshall v Lonberger, 459 U.S. 422 (1983) 9

Parker v Randolph, 442 U.S. 62 (1979) 8

Richardson v Marsh, 481 U.S. 200 (1987) 2, 4, 5, 6

Tennessee v Street, 471 U.S. 409 (1985) 6

United States v Olano, 507 U.S. 1770 (1993) 8

Williamson v United States, ___U.S.___, 114 S. Ct. 2431 (1994) 12

Zafiro v United States, 506 U.S. 534 (1993) 6, 8

U.S. Constitution

Sixth Amendment 2

Miscellaneous

Carretta & Moreland, "The Direct and Indirect Effects of Inadmissible Evidence", 13 *J. Applied Soc. Psychology* 291 (1983) 10

C. Visher, "Juror Decision Making-The Importance of Evidence", 11 *Law and Human Behavior* 1, n1-11 (1987) . . 10

J. Casper, K. Benedict and J. Perry, "Juror Decision Making, Attitudes, and the Hindsight Bias", 13 *Law and Human Behavior* 3, p 291-312 (1989) 9

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INTERESTS OF AMICI CURIAE

The amici curiae appearing in support of respondent are States bound by an interest in promoting the effective and efficient resolution of criminal matters in the courtrooms within their respective jurisdictions.

Should this Court determine that confessions of non-testifying co-defendants may be admissible at multiple defendant trials only if redacted in conformity with *Richardson v Marsh*, 481 U.S. 200 (1987), we expect that few such confessions will be amenable to such a conversion. The result would be to give prosecutors the dubious choice of foregoing the use of confessions or consenting to severance requests, leading to a likely increase in the number of trials conducted. Any added volume of litigation to an already overburdened system would implicate the ability to provide speedy trials, and an increase in severance requests would enhance the likelihood of inconsistent verdicts and verdicts issued without regard to relative culpability. The intangible result will be the dilution of justice.

For these reasons, we file this brief in support of respondent, the State of Maryland.

SUMMARY OF ARGUMENT

The Confrontation Clause states, "the accused shall enjoy the right. . . to be confronted with the witnesses against him". US Const. Amend. 6. In *Bruton v United States*, 391 U.S. 123, 136 (1968), this Court saw what it described as "powerfully incriminating" evidence being used at a criminal trial against a defendant, without opportunity being given the defense to confront the source. Because the evidence was in the form of a confession that specifically implicated this defendant, the Court concluded that the trial court's instructions to the jury to limit its application of the confession to the confessor was not enough to prevent the inevitable devastating prejudice to the defendant. Thus, a "narrow exception", *Richardson v Marsh*, 481 U.S. 200, 207 (1987), was made to the presumption that juries follow their instructions, and prosecutors were required to do more with such incriminating confessions to make them admissible at trials of multiple defendants.

The method of redaction employed by the State of Maryland in this case, together with limiting instructions to the jury, allowed the introduction of a confession at trial without spillover prejudice to the co-defendant. Because the *Bruton* Court allowed variations on achieving compliance with the Confrontation Clause, 391 U.S. at 133-134, and the jury would be presumed to follow its instructions under these circumstances, the procedure used by the State of Maryland was appropriate, and not violative of the Confrontation Clause.

The criminal justice system needs a clear rule as to how far a prosecutor must redact and revise the proof to be presented at trial so as to know when the benefit of a multiple defendant trial is outweighed by the burden imposed. Here, the State of Maryland achieved a proper balance between the competing interests of the state and the accused. The procedure of redacting facial implications from confessions, bolstered by a limiting instruction, was adequate to prevent the degree of prejudice anticipated in *Bruton*. The order of the Maryland Court of Appeals upholding the use of the confession as redacted, should be affirmed.

ARGUMENT

THE METHOD OF REDACTION EMPLOYED BY THE STATE OF MARYLAND TO PERMIT THE INTRODUCTION OF A CONFESSION AT A CRIMINAL TRIAL, WITH LIMITING INSTRUCTIONS TO THE JURY, REMOVED ALL SPILLOVER PREJUDICE TO A CO-DEFENDANT SO AS NOT TO BE VIOLATIVE OF THE CONFRONTATION CLAUSE.

The method employed by the State of Maryland in redacting petitioner's name from a co-defendant's confession, with limiting instructions to the jury, was not violative of the Confrontation

Clause. Although the Court in *Richardson v Marsh*, 481 U.S. 200 (1987), ruled that a confession which is redacted to eliminate reference to the existence of a co-defendant complies with the Confrontation Clause when the confessor does not testify, it did not create a bright-line rule that no other form of redaction was possible.

Here, the State of Maryland's use of the words "delete" and "deleted" in place of petitioner's name in a confession by a co-defendant removed all facial implications of him before the jury. The court's instructions, given at the time testimony was received about the confession and again at the end of the case, properly advised the jury about the limited use to be made of the statement. These procedures prevented the "devastating" prejudice to the petitioner foreseen in *Bruton v United States,* 391 U.S. 123 (1968), and achieved a proper balance between the state's interest in promoting criminal justice and the accused's right to confront witnesses against him.

A. CONSISTENT WITH THIS COURT'S DECISION IN *BRUTON*, THE REDACTION WITH A LIMITING INSTRUCTION AS APPROVED BY THE COURT BELOW, WAS NOT VIOLATIVE OF THE CONFRONTATION CLAUSE.

The procedure undertaken by the State of Maryland in removing petitioner's identity and all incriminating references to him from his co-defendant's confession, was consistent with this Court's decision in *Bruton v United States*, 391 U.S. 123 (1968), and not violative of the Confrontation Clause. In *Bruton*, this Court interpreted what a jury would intellectually accept in the instructions it received and created a limited exception to the well-settled presumption that juries follow the law. A confession by one defendant, implicating Mr. Bruton, his co-defendant, was introduced at their joint trial with limiting instructions that the jury was to consider the confession as evidence against the

confessor and not against Mr. Bruton. Although the statement would have been admissible as against the maker, this Court found that it was so prejudicial to Mr. Bruton that a jury could not be expected to comply with the accompanying limiting instruction not to use it against Mr. Bruton. The Court viewed the confession as "facially incriminating" and so damaging that a jury would not be able to disregard it when assessing the proof against the co-defendant. Without an opportunity to cross-examine the maker of the statement, Mr. Bruton was deemed denied his right of confrontation. Thus, this "narrow exception" to the presumption that juries follow the law was created and there has been no other exception made. *Richardson v Marsh,* 481 U.S. at 207.

In the same opinion, the Court acknowledged that there were competing interests between the State and the accused and held that there were "viable alternatives" which would not deny a prosecutor "the benefit of the confession to prove the confessor's guilt", without "infringing the nonconfessor's right of confrontation". 391 U.S. at 133-134.

The Court later advised that "[i]f limited to facially incriminating confessions, *Bruton* can be complied with by redaction". *Lee v Illinois*, 476 U.S. 530, 542 (1986). In the 1987 *Richardson* case, the Court had an opportunity to review the extreme steps taken by a trial court in redacting a confession admitted at a joint trial. The confession, which was facially incriminating to a co-defendant, was rewritten to eliminate all references to the conduct of the co-defendant, to the point of removing all references to her existence. This measure was ratified by this Court since "the calculus changes when confessions that do not name the defendant are at issue". 481 U.S. at 211. No longer "facially incriminating", the sanitized confession was admissible with a limiting instruction.

Since then this Court has explained that "the risk of prejudice will vary with the facts in each case. . . When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, as we indicated in *Richardson v Marsh,* less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice.". *Zafiro v United States*, 506 U.S. 534, 539 (1993). In cases with higher degrees of risk to a co-defendant than found here, this Court has permitted curative instructions to obviate the need for severance. For example, this Court has rejected a call for a bright-line rule requiring severance when there are "conflicting defenses" or "mutually antagonistic defenses" between and among co-defendants. *Zafiro v United States*, 506 U.S. 534 (1993). Clearly, the risk of harm inherent in a joint trial of multiple defendants who are blaming each other for the crime is not less than that found in a confession having all facial incriminations masked by redaction. In another case, the Court has allowed the use of an unredacted accomplice confession for the limited purpose of rebutting the defense that the confession of the co-defendant was coerced. *Tennessee v Street,* 471 U.S. 409 (1985). In both cases, the Court specifically has relied on the curative or limiting instructions of the trial court to remove the risks of prejudice to the co-defendants.

Here, rather than take the extreme step seen in *Richardson,* the State of Maryland adopted a moderate procedure to revise a *Bruton* confession, with an appropriate limiting instruction from the trial court. To comply with the *Bruton* rule, the trial court permitted redaction of the names of all co-actors referred to in the statement and allowed the State to insert the words "delete" and "deleted" in their place. The jury was then twice instructed as to the limited use of the confession in their deliberations.

By comparing the relative risk of prejudice in *Zafiro* and *Tennessee* to that degree of risk anticipated in the instant case,

it is clear that the trial court in Maryland acted appropriately. The procedures adopted for redaction were not unrealisitic in the expectations imposed on the jury. Indeed, mindful that the stated goal of *Bruton* is to prevent "spill-over prejudice" to a defendant when he is implicated by another defendant who cannot be cross-examined, *Lee v Illinois*, 476 U.S. at 542, the redaction by the State of Maryland, coupled with the trial court's instructions to the jury, adequately minimized any risk of prejudice to Mr. Gray.

The Maryland Court of Appeals correctly determined that the redacted statement did not facially incriminate Mr. Gray and any identification of him by the jury was not "compelled" by the other evidence before it (JA 105). Testimony by two prosecution witnesses who observed Mr. Gray's conduct at the scene of the group assault provided adequate proof of his involvement. A review of the redacted confession (JA 54-56) reveals that it was not as powerfully incriminating, if at all, as is insisted here by petitioner. Moreover, the court's instructions were sufficient to limit its application to the confessor.

If, as argued by petitioner, more than redaction of facial incrimination would be required of a prosecutor when attempting to introduce a confession at a multiple defendant trial, the adverse consequences to all parties cannot be overlooked. The impact on the effectiveness of the jury system cannot be ignored. Formulating a confession whereby the maker is portrayed as the lone actor, in a crime clearly evidencing several people would cast doubt on the maker's credibility. A jury that hears such a statement would pause to question the reliability of the words, as well as the effectiveness of the investigation. Moreover, the testimony of the police officers involved in the confession would need to be given with such care and caution that their own credibility would depend on how naturally they could appear when editing their responses to fit the final product. In practice, all of the rewriting and testifying in conformance with the

admissions could be for naught, if after the prosecutor has rested, the confessor chooses to testify.

It is likely that, rather than face the daunting task of editing a confession, prosecutors would opt for separate trials. But the costs would be high and the burdens most significant. All the reasons why joint trials are preferred would not outweigh the inability to comply with an intolerable extension of the *Bruton* rule.

B. JURIES MAY BE PRESUMED TO FOLLOW INSTRUCTIONS THAT ARE GROUNDED IN THEIR COMMON EXPERIENCE AND RESTATE THEIR WIDELY HELD BELIEFS.

We should continue to presume that juries follow the instructions they are given by the trial court and that they readily accept the law when it is consistent with their own experiences.

Juries are presumed to follow their instructions. *Francis v Franklin*, 471 U.S. 307, 325 n.9 (1965). This Court consistently has reaffirmed and relied upon this premise, describing it as a "crucial assumption" underlying our legal system. *Parker v Randolph*, 442 U.S. 62, 73 (1979); *Zafiro v United States*, 506 U.S. 534 (1993). Without such an assumption, "it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed". *Parker v Randolph*, 442 U.S. at 73. The belief that "juries, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them", *Francis v Franklin*, 471 U.S. 307, 324,n. 9 (1985), quoted in *United States v Olano*, 507 U.S. 1770 (1993), is necessary because we devote ourselves to a system that entitles us to judgment by a jury of our peers.

Our reliance on the jury to follow the law allows a court, in good conscience, to consign them issues of even the gravest importance. Consideration of penalty upon conviction, particularly the exercise of capital punishment, could only be given to members of our communities who are found to be willing and able to adhere to the laws as explained by the court. Such instruction, as any other, must be clear and with common meaning, permitting each juror to interpret fairly and impartially, weigh and apply the evidence and legal rules in reaching a just verdict. *Boyd v California,* 494 U.S. 370 (1990). In most instances, this is done.

Everyday we ask trial juries to accept evidence for specific and limited purposes and disregard it for others. Jurors are instructed to consider prior convictions, not to show criminal propensity, but to prove a specification for the charge (*Marshall v Lonberger*, 459 U.S. 422 [1983]); prior commission of the same criminal behavior as charged, not to show present guilt, but as proof only of notice, intent, motive, identification or lack of mistake (*Huddleston v United States,* 485 U.S. 681 [1988]); confessions unlawfully obtained, not for their admission, but for impeachment purposes (*Harris v New York,* 401 U.S. 222 [1971]). Even pretrial publicity and stricken testimony are to be disregarded. In all these instances, this Court has found that any risk of prejudice created by the use of the particular evidence was removed by the proper instructions to the jury. Those who advocate limiting the presumption that juries follow the law, rely on psychological studies and writings about human behavior and our ability to process and use information such as that received at a trial. Some conclude that juries are prone to ignore a judge's instructions or resist the legal explanation in favor of their own perceptions[1]. *See*, J. Casper, K. Benedict and J. Perry, "Juror

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[1]The process by which a jury resists a court's instructions because it is

(continued...)

Decision Making, Attitudes, and the Hindsight Bias", 13 *Law and Human Behavior* 3, p 291-312 (1989). Yet, those conclusions are not based directly upon empirical data and are usually offered merely to explain the results of their questionnaires. Indeed, these same studies, using questions emanating from a jury room as data, overlook the fact that there is such a high volume of jury questions, requesting further clarification and refinement of important pivotal words set forth in the instructions. Carretta & Moreland, "The Direct and Indirect Effects of Inadmissible Evidence", 13 *J. Applied Soc. Psychology* 291 (1983). The sheer number and type of questions make it clear that juries are fully intending to understand the meaning of the law and to apply it fairly to the facts before them. It remains speculative that jury reactance or jury nullification operates to undermine the process. *See,* C. Visher, "Juror Decision Making-The Importance of Evidence", 11 *Law and Human Behavior* 1, n1-11 (1987) (in which the author criticizes cognitive researchers who ". . . in the quest to identify sources of bias in jurors' decisions, . . . have often overlooked the impact of trial evidence which presumably dominates these decisions".). And it has been suggested that group deliberation would meliorate hindsight bias inherent in individual human cognitive reasoning.

It is apparent, however, that clear wording, simple sentences and everyday examples are necessary to educate a jury about the legal principles they are to apply. Common sense dictates that if members of a jury already hold a belief about the reliability or unreliability of certain evidence, it is reasonable to expect that

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[1](...continued)
inconsistent with the jury's prior understanding of, or beliefs related to, a point of law is described as "jury reactance". "Jury nullification" occurs when a jury "acquits against the evidence", and in so doing, ignores the court's instructions. J. Casper, K. Benedict and J. Perry, "Juror Decision Making, Attitudes, and the Hindsight Bias", 13 *Law and Human Behavior* 3, p 291-310 (1989).

the court's instructions will merely confirm what they have accepted in their own lives to be true.

Here, the jury would be expected to have no problem in accepting the words of the court that the redacted confession was to be applied as against only the confessor for several reasons. First, unlike in *Bruton*, the implicating statements were not "deliberately spread before the [them]". *Bruton v United States,* 391 U.S. at 136. Petitioner makes much of the fact that a jury will seek to "fill in the blanks" when offered a redacted statement. Yet, this is only speculative and there is nothing to suggest that the jury would not follow the law and rely on the direct testimony offered by the prosecution to prove the case against petitioner.

Second, although the Court has found confessions to be "powerfully incriminating" and "devastating", *Lee v Illinois*, 476 U.S. at 542, realistically, this is so only against the confessor. It is an overstatement to assert that everything said in a confession has the same prejudicial effect for everyone it may also incriminate. The risk of prejudice will depend on the details of the confession, the appearance of any attempt to minimize by the confessor, the amount of corroboration available, the relative importance and nature of other evidence, and any defense presented by the incriminated accomplice.

Third, if as this Court has stated, confessions that implicate others "have traditionally been viewed with special suspicion" and are "presumptively unreliable", *Lee v Illinois*, 476 U.S. at 541 and 543, it is inconsistent to attribute to them the same degree of resulting harm as given to the truly self-incriminatory confessions. Common sense suggests that a defendant's incrimination of another may be unreliable and untrustworthy. Fingerpointing is readily recognizable for what it is. There are countless examples of the untrustworthiness of the word of a co-defendant who has a "strong incentive to shift blame or down-

play his own role in comparison with that of others", *Williamson v United States*, __ U.S. __, 114 S. Ct. 2431, 2439 (1994), and none of this would be lost on a trial jury.

Certainly, this is what was meant in the dissenting opinion in *Cruz v New York*, 481 U.S. 186, 195-196 (1987), wherein it was said that "a co-defendant's out-of-court statements implicating the defendant are not only hearsay but also have traditionally been viewed with special suspicion. . . .And the jury may be so informed.".

It must be remembered that a defendant is not entitled to a "perfect trial". *Brown v United States*, 411 U.S. 223, 231-232 (1973). "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently". *Bruton v United States*, 391 U.S. at 135. *See, Hopt v Utah*, 120 U.S. 430 (1887).

An observation made in the dissenting opinion of *Lee v Illinois*, 476 US 530, 548 (1986), candidly suggests that the Court should not be "overly concerned with theory and pronounced principles for their own sake, and [should not] disregard the significant realities that so often characterize a criminal case. There is a real world as well as a theoretical one."

Instructions to a jury, perhaps reminding the members of their commonly held beliefs that words casting blame may be unreliable, would eliminate any danger that their "practical and human limitations", 391 U.S. at 135, would be reached. Words from the trial court that reaffirm what the jurors know from experience would be adequate protection against any "spillover prejudice" to an incriminated co-defendant. In any event, under the circumstances presented in the instant case, the procedures undertaken accomplished this result.

CONCLUSION

THE ORDER AND JUDGMENT OF THE COURT OF APPEALS OF MARYLAND SHOULD BE AFFIRMED.

Dated: Albany, New York
September 30, 1997

Respectfully submitted,

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